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COLUMBIA LAW REVIEW.

Vol. XVIII.

MARCH, 1918.

No. 3

GOVERNMENT CONTROL OF CORPORATIONS.

Before entering upon a discussion of the subject of the control of corporations by government, we must first consider what corporations really are. Blackstone, in his enthusiasm for the common law, declared that all legal fictions are equitable. But the fiction of a separate independent artificial personality resulting from the association of a group of men for a particular purpose, has produced consequences which cannot always be commended. The human mind, particularly the legal mind, delights in subtleties and often resorts to circumlocutions to accomplish results which would seem to be equally attainable by direct methods. Yet the indirect and the mysterious continue to attract, and much of our modern law is built upon fictions as absurd as the dogma that the common law was the perfection of human wisdom.

The Romans conceived the idea of the State as an abstract entity superior to and exempt from the restraints of that moral law which governed its individual members. The German autocracy has built the modern German state upon the same theory, and the world today is rocking in mortal struggle between the conception of an abstract state above all law and that of a commonwealth of men and women subject in its aggregate capacity to the same immutable principles of right and wrong as those governing the human beings who compose it.

In a lesser degree, the history of corporations furnishes an example of the same tendency. The term corporation is a mere label for a great or small number of men associated together for a particular purpose, to the accomplishment of which continuity of organization is essential. For convenience in the realization of its objects, the fiction of separate legal personality was invented. This

fictitious personality, like the Roman and the German state, being the mere creation of human ingenuity, disclaimed all moral responsibility in the exercise of the powers conferred upon it. It was born of the intellect, not of the spirit, and even when erected for what were called *pious uses*, the consequences resulting from legal immortality and moral vacuity, very early in English history called forth the exercise of legislative restraint and control. In the Roman law, corporations were formed by mere association without sovereign consent. A corporation or *collegium* could be formed by not less than three persons, who were said to be *corporati-habere corpus*. They could hold property in common and have a common chest. They might sue or be sued by their agent. There was a complete separation in law between the rights of the *collegium* as a body and those of its individual members. The *collegium* remained in existence, although all its original members were changed, and it was governed by its own laws, provided they were not contrary to the public law.¹ They were little more than partnerships, with the incident of continued existence despite changes in membership, and they were at all times subject to the law of the land.

In England, the earliest corporations were the trade guilds, the municipalities and the religious institutions; but it seems always to have been the law that the King's consent, either impliedly or expressly given, was absolutely necessary to the erection of any corporation; this consent being given either by act of Parliament or by charter, although such consent might be presumed from the lapse of time—prescription. In the great case of *Sutton's Hospital*,² Lord Coke said:

“Lawful authority of incorporation; and that may be by four means, *sc.* by the common law, as the King himself, &c., by authority of parliament; by the King's charter (as in this case) and by prescription.”

He also declared, in oft quoted language, that

“a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law; * * * They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney * * * A corporation aggregate of many cannot do fealty, for an invisible body can neither be in person, nor swear”.

¹Encyclopædia Britannica, title “Corporations”; 1 Bl. Comm. (Sharswood's Ed.) 473.

²(1613) 10 Coke 23a, at pp. 29b, 32b.

This is the basis for the oft repeated assertion in the literature of the English and the American law that corporations have no souls. It emphasized the metaphysical conception of an artificial invisible body; a person, in the eyes of the law, created by the association of a number of human beings for a common enterprise.³ In that same case of *Sutton's Hospital*, another seed of much trouble in modern times was sown by the declaration that one corporation may be made a part of another. For instance, said Lord Coke:

"the Mayor, citizens and commonalty of London are created in their politic capacity Governors, &c. of the hospital of Bridewell * * * many corporations may be created one of another, as the Dean and chapter of Lincoln are a joint corporation, the Dean by himself is a corporation, and every of the Prebends is a corporation by himself".⁴

Here is the germ of the modern law authorizing one corporation to own stock in another, which has reached its fullest development in the holding corporation, created for the sole and express purpose of taking and exercising rights of ownership over stock in other corporations.

The American doctrine, like the English, is that no corporation can exist except by the will of the sovereign, exercised with us by the legislature. But in this country, as in England, a charter may be presumed to have been given to persons who have long acted as a corporation, and assumed and exercised all the powers of a corporate body, whether of an ordinary or extraordinary nature.⁵ Corporations created by royal charter, prior to the revolution, were by constitutional provisions in most states recognized and their powers declared inviolate by reason of the change in sovereignty. Thus, the first Constitution of the State of New York, adopted in 1777, contained a provision, which has been incorporated in every subsequent constitution, that

"nothing in this constitution contained shall be construed to affect any grants of land within this state, made by the authority of the said King or his predecessors, or to annul any charters to bodies politic, by him or them, or any of them, made prior to that day.

³"Such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." 1 Bl. Comm. (Sharswood's Ed.) 123.

⁴At p. 32a.

⁵*Bank of United States v. Dandridge* (1827) 25 U. S. 64.

And that none of the said charters shall be adjudged to be void by reason of any non-user or mis-user of any of their respective rights or privileges, between the nineteenth day of April, in the year of our Lord one thousand seven hundred and seventy-five, and the publication of this constitution."⁶

The Constitution of 1846 provided for the creation of corporations under general laws, but declared that all general laws and special acts passed pursuant to such provision might be altered from time to time or repealed. The Constitution of 1894, Article VIII, repeated this provision.

The Constitution of the United States forbade states to enact laws impairing the obligations of a contract, and in the famous Dartmouth College case,⁷ a royal charter granted in 1769 erecting the corporation of Dartmouth College and granting to its trustees certain powers, was held to be a contract which was protected by this constitutional provision from modification or impairment by acts of the legislature of the State of New Hampshire. The line of distinction between contract rights which were protected and the powers of the legislature which must remain unimpaired was clearly drawn by Chief Justice Marshall.⁸

"If the act of incorporation", he said, "be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transactions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

"But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves; there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause."

⁶N. Y. Constitution of 1777, paragraph xxxvi.

⁷Dartmouth College v. Woodward (1819) 17 U. S. 520.

⁸At pp. 629-630.

Analyzing the history of the foundation and the nature of the institution, the Supreme Court held the case to fall within the second alternative above stated, and decided that the college had not become a public institution, its trustees were not public officers exercising powers conferred by the public upon public officers, and that neither from the fact of the incorporation nor the consideration of the persons for whose benefit the property given to the college was secured, could a conclusion be drawn at variance with the determination that the charter was a contract to which the donors, the trustees and the Crown (to whose rights and obligations New Hampshire had succeeded) were the original parties. It is, said the Court,⁹

“a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the constitution, and within its spirit also, unless the fact, that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.”

These facts, the Court held, did not remove the case from the operations of the Constitution, and the deliberate judgment of the Court was that the grant was a contract, the obligation of which could not be impaired without violating the Constitution of the United States.

“It may well be doubted,” said Mr. Justice Miller in commenting on this case, “whether any decision ever delivered by any court has had such a pervading operation and influence in controlling legislation as this.”¹⁰

The decision, he said,

“has stood from the day it was made to the present hour as a great bulwark against popular effort through State legislation to evade the payment of just debts, the performance of obligatory contracts, and the general repudiation of the rights of creditors.”¹¹

⁹At p. 644.

¹⁰Miller, Constitution of the United States, 391.

¹¹At p. 394.

Yet, almost immediately after the decision of this case in 1819, states sought to prevent its application to future incorporations by inserting in all statutes granting corporate privileges and powers the condition that all charters should be subject to amendment, alteration or repeal at the pleasure of the legislature, and by inserting in state constitutions the provision that no charter of incorporation thereafter should be granted except subject to amendment, alteration or repeal at the will of the legislature. These provisions entered into and became a part of all charters of incorporation thereafter granted, and the contract of incorporation therefore was not violated or impaired by a subsequently enacted statute modifying or abolishing the powers granted.¹²

While the reservation of control in state constitutions or statutes puts charters conferring corporate capacity or grants upon the same footing as to amendment or repeal as other statutes so far as the relation of the state to the corporation is concerned, it is settled that the state may not by virtue of such reservation take away or destroy vested rights which have been acquired under a charter or grant, or which, by legitimate use of the powers granted, have become vested in the corporation.¹³

Therefore, it was held by the New York Court of Appeals that while the legislature might repeal the charter of the Broadway Surface Railroad Company, which had been organized under a general railroad law, because of the scandals attendant upon the methods by which it had procured from the Common Council of the City of New York power to lay its tracks and operate its railway in the city streets, thereby terminating the corporate existence of the company, such repeal did not affect the rights or franchises acquired by the company from the city, nor impair the force of the bonds it had issued and the mortgages executed by it upon its property and franchises to secure the payment thereof; and that all of these properties and intangible rights, upon the repeal of the charter, vested in the directors of the company as trustees for the creditors and stockholders, subject to all liens and contracts which lawfully had been created and entered into prior to such repeal.

"The power to repeal the charter of a corporation", said Chief Judge Ruger, in delivering the opinion of the court, "cannot, upon any legal principle,

¹²Miller, *op. cit.*, 557, 558.

¹³Marshall's Constitutional Opinions (Dillon's Ed.) 301, 302; *People v. O'Brien* (1888) 111 N. Y. 1, 18 N. E. 692.

include the power to repeal what is in its nature irrevocable, or to undo what has been lawfully done under power lawfully conferred.

* * * * *

"It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only, could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty or property of citizens beyond the scope of express constitutional power."¹⁴

In the Dartmouth College case,¹⁵ Chief Justice Marshall defined a corporation as

"an artificial being, invisible, intangible, and existing only in contemplation of law."

Among the most important of its properties, he said,¹⁶

"are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being."

Ten years before the Dartmouth College case was decided, there came before the Supreme Court in the case of *Bank of United States v. Deveaux*,¹⁷ the question whether or not a corporation might sue in the federal courts under the provisions of the Constitution and the Judiciary Act which extended the judicial power of the United States to controversies between citizens of

¹⁴At pp. 48-49.

¹⁵*Supra*, footnote 7, at p. 636.

¹⁶At p. 636.

¹⁷(1809) 9 U. S. 61.

different states. Chief Justice Marshall, writing the opinion of the Court, held that

"That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, may not sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, not as a company of individuals, who in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union."¹⁸

Therefore, it was held that the Court might look to the character of the individuals who compose the corporation, and if all of them were citizens of a state other than that of the opposite party to the suit, maintain the jurisdiction of the federal court, but not otherwise. This decision is about the only recorded example of a narrow construction by Chief Justice Marshall of the powers granted by the Constitution to the federal government. The logic of the opinion is convincing, but its application would largely have destroyed the practical value of incorporation. Subsequent reflection led the great Chief Justice to a different conclusion, as his opinion in the Dartmouth College case demonstrates, and his biographers record that in later life he became satisfied that the decision in *Bank of United States v. Deveaux* was wrong. It was substantially overruled by the court in *Louisville R. R. v. Letson*,¹⁹ where it was held to be a legal presumption that the members of a corporation were citizens of the state in which alone the corporate body had legal existence; that a suit by or against the corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the corporate body, and that no averment or evidence to the contrary was admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. This was reiterated in the cases of *Marshall v. Baltimore & Ohio R. R.*²⁰ and *Covington Drawbridge Co. v. Shepherd*,²¹ and was finally and definitely declared to be the law in an opinion by Chief Justice Taney in *Ohio & Mississippi R. R. v. Wheeler*.²² The Court in the con-

¹⁸At pp. 86-87.

¹⁹(1844) 43 U. S. 497.

²⁰(1853) 57 U. S. 314.

²¹(1857) 61 U. S. 227.

²²(1861) 66 U. S. 286.

sideration of this question was confronted with a dilemma: if they held that a corporation was a citizen of the state by which it was created, within the meaning of the Constitution, then it would follow that corporations were entitled to all of the rights secured to citizens in that document, and this would seriously restrict the legislative control of these bodies. Avoiding this conclusion, the Court was left free to determine, as it has, that a corporation is not a citizen within the meaning of Section 2 of Article IV, entitling the citizens of each state to all the privileges and immunities of citizens of the several states, nor the provisions of Section 1 of Article XIV, forbidding states to

“make or enforce any law which shall abridge the privileges or immunities of citizens of the United States”.

On the other hand, it is well established that a corporation is a *person* within the meaning of the prohibitions of the Fifth Amendment against depriving a person of property without due process of law, or taking private property for public use without just compensation, and those of the Fourteenth Amendment which prohibit a state from depriving any person of life, liberty or property without due process of law, or denying to any person within its jurisdiction the equal protection of the laws. As Judge Dillon says, the result finally reached by the Supreme Court respecting the capacity of a corporation to sue or be sued in the federal tribunals,

“was doubtless essential to carry out the full purpose of the Constitution in providing for a Federal judiciary, but the serious difficulties arising out of the word ‘citizen’ in the Constitution in reaching that result are among the most impressive illustrations of the important part which fiction plays in the development of every system of jurisprudence.”²³

Since the declaration of war with Germany, the question has arisen in our courts whether or not the fact that a majority of its shares are owned in Germany, precludes a corporation incorporated under the laws of one of the states from access to our courts during the war. In New York, the question was answered in the negative by the appellate term of the supreme court in the first department, in a learned and interesting opinion by Mr. Justice Lehman.²⁴

²³Marshall's Constitutional Opinions (Dillon's Ed.) 167.

²⁴Schultz Co. v. Raimes & Co. (1917) 100 Misc. 697, 166 N. Y. Supp. 567.

He cited and relied upon the statement in *St. Louis, etc., Ry. v. James*,²⁵ to the effect that the result of the decisions is that

"There is an indisputable legal presumption that a State corporation, when sued or suing in a Circuit Court of the United States, is composed of citizens of the State which created it".

The conclusions of the court were thus summed up:²⁶

"Throughout all these decisions the courts have indicated practically unanimously that they regard a corporation as an entity separate and apart from its corporators; that its domicile is as a matter of law within the state of its creation and that the courts will not regard it merely as an association of individuals or regard the domicile or character of the corporators as affecting the domicile or character of the corporation. It may be that where a corporation is composed entirely of alien enemies residing in an enemy country a situation will arise requiring the interposition of a receiver or conservator to take charge of the corporate affairs because none of the members can legally deal with the corporation or actually manage its affairs; it may be that a corporation will be unable to distribute its profits for the same reason. So long, however, as a corporation created by any state still has legal existence and officers or agents with authority to do business or to bring actions, it cannot be deprived of access to the courts for the protection of its legal rights."

The personality or status of a corporation thus being settled, its mobility may be considered. Before the Supreme Court had settled the question of status, Chief Justice Taney declared in the great case of *Bank of Augusta v. Earle*²⁷ that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists, he said,²⁸

"only in contemplation of law, and by force of law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty."

²⁵(1896) 161 U. S. 545, at p. 562, 16 Sup. Ct. 621.

²⁶*Supra*, footnote 24, at p. 710.

²⁷(1839) 38 U. S. 519.

²⁸At p. 588.

Upon this *dictum* has been built a vast structure of law respecting the conditions which may be imposed by one state as a condition to the corporation of another state doing business within its limits; for, despite the assertion of the Court, corporations habitually do migrate and carry on business in states other than that of their creation. Indeed, this very case upheld the validity of a purchase in Alabama by the agents of certain corporations of other states of bills of exchange drawn there upon residents in New York. The Chief Justice in sustaining the validity of this transaction inquired what greater objection there could be to the capacity of an artificial person *by its agents*, to make a contract within the scope of its limited powers in a sovereignty in which it did not reside, than for a natural person, by its agents, to do a similar act, provided such contracts were permitted by the laws of the place. The right of migration was expressly recognized in *Canada Southern Ry. v. Gebhard*,²⁹ and in *Relfe v. Rundle*³⁰ it was stated that wherever a corporation goes it carries its charter, for that is the law of its existence, the same at home as abroad. A corporation of one country or state may be excluded from business in another country or state,³¹ but if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country or state, be taken, both by the government and those who deal with it, as a creature of the law of its own country and subject to all the legislative control and direction that may properly be exercised over it at the place of its creation. It is on this basis, that in determining for the purposes of taxation, the value of the proportion of the capital of a corporation which is employed in business in a state, other than that of its creation, in which it is engaged in doing business, it is held to be lawful to include, not merely the tangible value of the property of the corporation within the taxing state, but that proportion of the intangible value which the value of the tangible property in one state bears to the aggregate of the tangible property in all the states.³²

Recognizing the right of migration, the later decisions of the Supreme Court have held that each state possesses plenary power to exclude a foreign corporation from doing business within its

²⁹(1883) 109 U. S. 527, 3 Sup. Ct. 363.

³⁰(1880) 103 U. S. 222.

³¹*Paul v. Virginia* (1868) 75 U. S. 168.

³²See *Adams Express Co. v. Ohio* (1897) 165 U. S. 194, 17 Sup. Ct. 305; (1897) 166 U. S. 185, 17 Sup. Ct. 604.

borders, and, therefore, may impose upon its coming within them to carry on business any condition which is not in violation of the Constitution of the United States.³³ The limitation upon the power of the state is that it cannot make the right to do business within a state depend upon a surrender by the corporation of a privilege secured to it by the Constitution.³⁴ The Express Company cases,³⁵ the Drummers cases³⁶ and the Telegraph Company cases³⁷ are familiar instances of decisions by the Supreme Court holding state legislation to be unconstitutional as interfering with the federal regulation of interstate commerce. Subject, therefore, to restrictions imposed by the Federal Constitution and in many instances the state constitutions, protecting corporations as well as natural persons against deprivation of property without due process of law, the taking of property for public use without just compensation and the denial of the equal protection of the laws, the control of corporations by the state creating them is plenary. It is limited only by the prohibition against requiring the surrender of rights secured by the Constitution of the United States as a condition to carrying on business within the jurisdiction. Subject only to that limitation, every state has the absolute right to exclude or admit on such terms and conditions as it may choose to impose, a corporation created by another sovereignty. Even the protection against the taking of property without due process, the denial of equal protection and the liability to having private property taken for public use without compensation, is qualified by the increasing scope given by the Supreme Court in its recent decisions to the police power. That Court has declared it to have been established by its repeated decisions,

"that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by ex-

³³Paul v. Virginia, *supra*, footnote 31; Hammond Packing Co. v. Arkansas (1909) 212 U. S. 322, 29 Sup. Ct. 370; Security Mutual Life Ins. Co. v. Prewitt (1906) 200 U. S. 446, 26 Sup. Ct. 314; (1906) 202 U. S. 246, 26 Sup. Ct. 619.

³⁴Insurance Co. v. Morse (1874) 87 U. S. 445; Blake v. McClung (1898) 172 U. S. 239, 19 Sup. Ct. 165.

³⁵Crutcher v. Kentucky (1891) 141 U. S. 47, 11 Sup. Ct. 851.

³⁶Norfolk & Western Ry. v. Sims (1903) 191 U. S. 441, 24 Sup. Ct. 151; Rearick v. Pennsylvania (1906) 203 U. S. 507, 27 Sup. Ct. 159.

³⁷Pensacola Tel. Co. v. Western Union Tel. Co. (1877) 96 U. S. 1.

press grant; and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 558, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals and safety."³⁸

This police power, the Supreme Court has characterized as

"one of the most essential powers of government, one that is the least limitable".³⁹

The Court has frequently declared the limits of the police power to be indefinable. The nearest approach to a definition given in the recent cases is that of Mr. Justice Holmes in the *Oklahoma Bank Guaranty* cases,⁴⁰ where he said:

"With regard to the police power, as elsewhere in the law, lines are pricked out by the gradual approach and contact of decisions on the opposing sides. * * * It will serve as a datum on this side, that in our opinion the statute before us is well within a State's constitutional power, while the use of public credit on a large scale to help individuals in business has been held to be beyond the line."

An example of a statute which was also held to be beyond the line is furnished in the case of *MacFarland v. American Sugar Co.*,⁴¹ where the Court said:

"If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of plaintiff's monopolizing it and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws."

Dealing with more general conditions, in the case of *Adair v. United States*,⁴² the Court held that an act of Congress making it

³⁸*Chicago & Alton R. R. v. Tranbarger* (1915) 238 U. S. 67, at pp. 76-77, 35 Sup. Ct. 678.

³⁹*Hadacheck v. Los Angeles* (1915) 239 U. S. 394, at p. 410, 36 Sup. Ct. 143.

⁴⁰*Noble State Bank v. Haskell* (1911) 219 U. S. 104, at p. 112, 31 Sup. Ct. 186.

⁴¹(1916) 241 U. S. 79, at pp. 86-87, 36 Sup. Ct. 498.

⁴²(1908) 208 U. S. 161, 28 Sup. Ct. 277.

illegal for an employer engaged in interstate commerce to require as a condition to employment by it the making of an agreement that an employee would not become a member of a labor organization, was an invasion of personal liberty as well as of the right of property granted by the Fifth Amendment. And in *Coppage v. Kansas*,⁴³ it was held that a state statute making it a crime for an employer to require an employee to agree not to become or remain a member of a labor organization during the term of his employment was repugnant to the due process clause of the Fourteenth Amendment.

Police regulations, the Court has declared, in like manner as any other statute of a state, are subject to the equal protection clause of the Fourteenth Amendment. That guarantee, while not preventing proper classification, does entitle all persons and corporations within the jurisdiction of the state to the protection of equal laws, including police regulations, and therefore it was held that a state statute which imposed reciprocal burdens on both carrier and shipper, but which provided that in the case of delinquency on the part of the *carrier*, the shipper might recover an attorney fee, but made no provision that in case of delinquency on the part of the *shipper*, the carrier might recover a like fee, did not secure the equal protection of the law guaranteed by the Fourteenth Amendment, and therefore was void.⁴⁴

On the other hand, a statute of Arkansas requiring full switching crews on railroads exceeding one hundred miles in length was held not unconstitutional as depriving a railroad company over one hundred miles in length of its property without due process of law or as denying it equal protection of the law or as an interference with or burden upon interstate commerce.

"We have recognized", said the Court, "the impossibility of legislation being all comprehensive and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant."⁴⁵

As the Court said in considering a statute of Florida which made it a criminal offense to deliver for shipment in interstate

⁴³(1915) 236 U. S. 1, 35 Sup. Ct. 240.

⁴⁴*Atchison, T. & S. F. Ry. v. Vosburg* (1915) 238 U. S. 56, 35 Sup. Ct. 675.

⁴⁵*St. Louis & Iron Mt. Ry. v. Arkansas* (1916) 240 U. S. 518, at p. 521, 36 Sup. Ct. 443.

commerce citrous fruits then being immature and unfit for consumption :

"The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court. * * * The police power, in its broadest sense, includes all legislation and almost every function of civil government. * * * It is not subject to definite limitations, but is coextensive with the necessities of the case and the safeguards of public interest. * * * It embraces regulations designed to promote public convenience or the general prosperity or welfare, as well as those specifically intended to promote the public safety or the public health."⁴⁶

Therefore, any attempt to deal with the subject of governmental control of corporations must always recognize that in the police power there is a vast reservoir of control, the extent of which may not be gauged in advance, but the precise application of which in any given case must be submitted to the consideration of the court, unless it clearly oversteps the limits of permissible legislative discretion and becomes the obvious exercise of arbitrary power.

The line of demarcation between the permitted and the prohibited exercise of the reserved police power of the state is not easily drawn. The doctrine as applied to railways—and it would seem to be equally applicable to all corporations carrying on a business affected with a public use—is thus summed up in a very recent decision of the Supreme Court.⁴⁷

"A State may regulate the conduct of railways within its borders, either directly or through a body charged with the duty and invested with powers requisite to accomplish such regulation.

* * * * *

"But while the scope of this power of regulation over carriers is very great and comprehensive, the property which is invested in the railways of the country is nevertheless under the protection of the fundamental guarantees of the Constitution and is entitled to as full protection of the law as any other private property devoted to a public use, and it can-

⁴⁶*Sligh v. Kirkwood* (1915) 237 U. S. 52, at pp. 58-59, 35 Sup. Ct. 501.

⁴⁷*Mississippi R. R. Comm. v. Mobile & Ohio R. R.* (1917) 244 U. S. 388, at pp. 390, 391, 37 Sup. Ct. 602.

not be taken from its owners without just compensation or without due process of law.

* * * * *

"If this power of regulation is exercised in such an arbitrary or unreasonable manner as to prevent the company from obtaining a fair return upon the property invested in the public service it passes beyond legal bounds, and such action is void, because repugnant to the due process of law provision of the Fourteenth Amendment to the Constitution of the United States."

Yet in view of the decision in the Trading Stamp cases,⁴⁸ the Net Weight Lard Statute,⁴⁹ and the "Blue Sy" Laws,⁵⁰ it may be assumed that only a clear exercise of arbitrary power such as that attempted to be exercised by the State of Louisiana in the statute condemned by the United States Supreme Court in *McFarland v. American Sugar Co.*⁵¹ will be held to overstep the state authority.

In one of the Trading Stamp cases, the Court said:⁵²

"It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. * * * It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of courts to arbitrate in such contrariety."

In the *McFarland* case, the Court said of a Louisiana statute which created a rebuttable presumption that any person systematically paying in that state a less price for sugar than he paid in any other state was a party to a monopoly or conspiracy in restraint of trade:⁵³

"As to presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential

⁴⁸*Rast v. Van Deman & Lewis* (1916) 240 U. S. 343, 36 Sup. Ct. 370.

⁴⁹*Armour & Co. v. North Dakota* (1916) 240 U. S. 510, 36 Sup. Ct. 370.

⁵⁰*Hall v. Geiger-Jones* (1917) 242 U. S. 539, 37 Sup. Ct. 217; *Caldwell v. Sioux Falls Stock Yards Co.* (1917) 242 U. S. 559, 37 Sup. Ct. 224; *Merrick v. Halsey & Co.* (1917) 242 U. S. 568, 37 Sup. Ct. 227.

⁵¹*Supra*, footnote 41.

⁵²*Supra*, footnote 48, at p. 357.

⁵³*Supra*, footnote 41, at p. 86.

that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, Jackson & Kansas City R. R. v. Turnipseed*, 219 U. S. 35, 43. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."

An enumeration of an illustrative variety of classifications sustained as legal, being within the power of the legislature over the subject matter, is given by Mr. Justice McKenna in the opinion of the Court in one of the Trading Stamp cases,⁵⁴ where he contrasts the principle therein involved with the decision in *Truax v. Raich*,⁵⁵ which held a state statute void because it required all employers of five laborers or more to employ not less than eighty per cent. qualified electors or native-born citizens of the United States.

"The statute was held void", says the Court, "because there was no authority to deal with that at which the legislation was aimed. And this is important to be kept in mind. If there is no such authority, a classification, however logical, appropriate or scientific, will not be sustained; if such authority exist, a classification may be deficient in those attributes, may be harsh and oppressive, and yet be within the power of the legislature."

One other feature of the question should be adverted to before closing this necessarily imperfect review of the subject, and that is the power of the federal government to regulate corporations created by the states through the exercise of the power to regulate commerce among the states.

In *Hale v. Henkel*,⁵⁶ the Court held that an officer or employee of a state corporation summoned before a federal grand jury as a witness was not excused from producing the books and documents of the corporation upon the ground that they might tend to incriminate it, declaring that while it was true that the corpora-

⁵⁴*Tanner v. Little* (1916) 240 U. S. 369, at pp. 382-383, 36 Sup. Ct. 379.

⁵⁵(1915) 239 U. S. 33, 36 Sup. Ct. 7.

⁵⁶(1906) 201 U. S. 43, 26 Sup. Ct. 370.

tion was chartered under the laws of one of the states and received its franchise from the legislature of that state, nevertheless

"such franchises, so far as they involve questions of interstate commerce, must also be exercised in subordination to the power of Congress to regulate such commerce, and in respect to this the General Government may also assert a sovereign authority to ascertain whether such franchises have been exercised in a lawful manner, with a due regard to its own laws. Being subject to this dual sovereignty", the court continued, "the general government possesses the same right to see that its own laws are respected as the State would have had with respect to the special franchises vested in it by the laws of the State. The powers of the General Government in this particular in the vindication of its own laws, are the same as if the corporation had been created by an act of Congress."⁵⁷

So, in the exercise of this power and to carry out the prohibitions against combinations in restraint of trade or to effect monopoly, the federal courts have prohibited the continued stockholding by one corporation in another, under penalty of being deprived of the right to carry on commerce among the states,⁵⁸ and by the so-called Clayton Act of Congress, approved October 15th, 1914, supplementing the Sherman Anti-trust Law, it was enacted⁵⁹ that with certain exceptions and qualifications not necessary to consider here, no corporation engaged in interstate commerce shall acquire directly or indirectly the whole or any part of the stock or other share capital of another corporation also engaged in such commerce, where the effect of such acquisition might be substantially to lessen competition between the corporation whose stock was so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or to tend to create a monopoly of any line of commerce; that no corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce, where the effect of such acquisition or the use of such stock by the voting or granting of proxies or otherwise, may

⁵⁷At p. 75.

⁵⁸*Standard Oil Co. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502; *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 31 Sup. Ct. 632; *United States v. Union Pacific R. R.* (1912) 226 U. S. 61, at p. 97, 33 Sup. Ct. 53.

⁵⁹38 Stat. 731, § 7, 8 U. S. Comp. Stat. (1916) § 8835g.

be substantially to lessen competition between such corporations or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community or tend to create a monopoly of any line of commerce; and that from and after a date fixed in the act, no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce (with certain exceptions), if such corporations are or shall have been theretofore by virtue of their business and local operation, competitors so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the anti-trust laws.

This statute has not yet been passed upon by the Supreme Court of the United States, and it is quite possible that some of its provisions may be held to be beyond the power of Congress to enact. Nevertheless, they are indicative of a growing tendency on the part of the federal government to regulate, not merely the activities, but the internal organization of corporations created under the laws of the states, and they must be regarded in connection with any consideration of the subject of governmental control.

The greatest advance in the judicial recognition of the extent of Congressional power over corporations engaged in interstate commerce was taken in the decision⁶⁰ upholding the constitutionality of the so-called Adamson Law, enacted by Congress in September, 1916, and approved by the President on Sunday, September 3, and also on Tuesday, September 5th, 1916,—probably the only statute ever approved by the President on Sunday; certainly the only one approved twice. This statute establishes an eight-hour day standard for work and wages as between the carriers and employees affected, and also fixes a scale of minimum wages for the eight-hour day, and proportionally for overtime, to be in force only during a limited period defined in the act.

Viewed as an act establishing an eight-hour day as the standard of service by employees, the Court held the statute to be clearly within the power of Congress under the commerce clause. So far as fixing wages is concerned, the Court held the act to be the exertion of the power of Congress to arbitrate compulsorily the dispute between the parties,—a power susceptible of exercise by direct legislation, as well as by enactment of other appropriate

⁶⁰*Wilson v. New* (1917) 243 U. S. 332, 37 Sup. Ct. 298.

means for reaching the same result. The existence of this latter power was predicated upon the nature of the business of a common carrier by rail—

“in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled”.⁶¹

The Court emphasized the distinction between the power to enact a law

“concerned only with those engaged in a business charged with a public interest where the subject dealt with as to all the parties is one involved in that business”⁶²

which comes under the control of the right to regulate

“to the extent that the power to do so is appropriate or relevant to the business regulated”,⁶³

and the private right and private interest of employer and employees to agree as to a standard of wages, which, relating to a business not charged with a public interest, is not subject to be controlled or prevented by public authority.

A review of the decisions referred to will show the continued exercise by the legislature, with the approval of the courts, of the power to regulate the conduct of corporations, and the widening scope of the police power conceded by the federal government to the States. The power which is acquired by individuals working in co-operation is far greater than the aggregate force of the same number working separately. In union there is strength, is an ancient maxim. Throughout the history of civilization the struggle between the power of individuals and groups of individuals, on the one hand, and the interest of the commonwealth, on the other, has been continuous. No state can long endure, which does not preserve its supremacy over private combinations, whether in the garb of corporations, or otherwise. The ideal of the American republics has been the maintenance of liberty under law, for the security of the maximum scope of individual initiative consistent with the

⁶¹At p. 347.

⁶²At p. 353.

⁶³At pp. 353-354.

public welfare. To that end, constitutions, state and national, are ordained. The socialized state may be in an abstract sense a more ideal form of government than a representative republic exercising powers limited by fundamental law. But a society in which generous emulation was denied scope would speedily die, and our forefathers wisely framed our institutions in recognition of the facts of human nature. To the preservation of these opportunities and through them, the continued prosperity of the whole people, the constant and wise exercise of regulatory powers is required,—powers limited by prohibition against arbitrary act— but, except as thus limited, adaptable to all the changing exigencies of an increasingly complex civilization.

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